N THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.143/2005
AND
MISC. CIVIL APPLICATION NO. 98/2006

1. Shri Sarvottam Shivram Prabhu Dessai,
major of age, landlord, H.No. 290,
Rivona, Goa (since deceased) by his heirs.

b) Ashish S. Prabhudessai,
major of age, business, r/o.
Rivona, Goa.

c) Swati A. Prabhudessai, major of age,
housewife, Rivona, Goa.

d) Mrs. Snehal S. Sanzgiri,
major, housewife and her husband;

e) Shri Sanjeev Sanzgiri, major, service,
r/o. U.S.A.

f) Smt. Deepa Sandeep Kamat Azrenkar,
major, married, housewife;

g) Shri Sandeep Venkatesh Kamat Azrenkar,
major, business, Mapusa, Goa.

The above applicants No.1 c to 1 g
are represented by their power of
attorney dated 4.9.2003 holder
Shri Ashish Sarvottam Prabhu Dessai
viz. Applicant no.1(a).

2. Smt. Pramila S. Prabhudessai,
major in age, housewife, r/o. H.No.290,
Rivona, Goa. ..... Appellants.

V/s.

1. Shri Prema V.P. Dessai,

major of age, landlord,
H.No. Not known, Rivona, Goa.

2. Smt. Laximibai Prema P. Dessai,
major of age, housewife,
r/o. H.No. Not known, Rivona, Goa. ..... Respondents.

Shri V. P. Thali, Advocate for the appellants.

Shri C. A. Coutinho, Advocate for the respondents.

CORAM : P.V. KAKADE, J.

DATE : 27th September, 2006.

ORAL ORDER :

Heard both sides. Perused the record. The unsuccessful plaintiffs have preferred this appeal against the Judgment and Order passed by the Additional District Judge, South Goa, Margao dismissing their appeal and confirming the Judgment and Order passed by the trial Court dismissing the plaintiffs' suit for declaration to the effect that the plaintiffs were the absolute owners in possession of the suit property bearing survey Nos. 67/1 and 68/21 of Village Rivona, Taluka Sanguem and consequently for directions to the Talathi, A.K. or appropriate authorities under the provision of Land Revenue Code to correct the survey records by deleting the name of defendant no.1 against survey No.68/21 of Village Rivona Taluka Sanguem.

2. Before turning to the facts as well as merits, it is to be clarified that both the parties agree that there is no dispute pertaining to the land surveyed under No. 67/1 of Village Rivona and, therefore, the observations made and the findings recorded by the Courts below pertaining to Survey No.67/1 would not be taken as decree of the Court, as there is no dispute between the parties in that regard. Similarly, the learned Counsel for the appellants fairly conceded that the later part of his prayer clause to the effect that the directions which were to correct the survey records to the Talathi, were not called for and those need not be taken into account.

3. The appellants-plaintiffs filed the suit for declaration, as noted above, with a claim that they were exclusive owners in possession of the suit property known as “Vorni” also known as “Varny” or Vorni Vangana” situated at Rivona, Sanguem Taluka bearing Land Registration No.1881 and Land Revenue Nos.635, 636 and 780. It was alleged that in respect of survey No. 68/21, the name of defendant No.1 was erroneously recorded as co-occupant and in fact the defendant had no right, title or interest in the suit property and the plaintiffs continued to be in possession and enjoyment inspite of the error in the survey record. It was further stated that on 19.11.97, the plaintiff No.1 requested the defendant No.1 to delete

his name from the survey No.68/21, however, the defendant No.1 did not respond and hence, the suit came to be filed for declaration. The defendants contested the suit, inter alia, denying the allegations made by the plaintiffs and submitted that the land bearing Survey No. 68/21 was in their possession and since the plaintiffs have not prayed for relief of possession, the suit was not maintainable. On such and other grounds, the suit was sought to be dismissed with costs.

4. The learned trial Judge, after hearing both the parties, came to the conclusion that the plaintiffs had not succeeded in proving their exclusive ownership title to the suit property and as such, the suit for declaration came to be dismissed. The appeal was preferred to the District Court and the learned Addl. District Judge, South Goa, Margao concurred with the findings recorded by the trial Court and dismissed the appeal and hence the present appeal.

5. At the outset, it is to be noted that there is no substantial question of law involved in this appeal. The questions which are sought to be raised as the substantial questions of law, are the questions of fact. It was submitted that the suit could not have been dismissed on the ground that the plaintiffs had failed to identify the boundaries of the suit property

when there was concurrent findings of fact that the plaintiffs had proved ownership of the suit property. It was further submitted that the findings recorded with regard to the ownership title pertaining to the land surveyed under No.68/21 were perverse and, therefore, intervention of the Court was necessary.

6. At this stage, it may be noted that the appellants also filed Misc. Civil Application No. 98/02 under Order 41, Rules 27 of the Code of Civil Procedure, seeking permission to bring on record additional evidence with a plea that the evidence could not be produced earlier and it would be of assistance to adjudicate the issues involved effectually. It must be noted that there is absolutely no reason as to why the said application was not moved in the course of pendency of the first appeal before the District Court, especially when the appellants were aware as to why and under what circumstances, the suit came to be dismissed. There is no explanation on record or otherwise for such omission and, therefore, I am inclined not to allow the application for producing the additional evidence on record. The learned Counsel for the appellants sought to put reliance on the Judgment of the Calcutta High Court in the case of ***Hindusthan Petroleum Corporation Ltd., v. M/s. R.P. Agarwalla & Brothers (Pvt.) Ltd.,*** AIR 1986 Calcutta 403 wherein the concerned Court had an occasion to deal with the

issue as to when the powers to allow additional evidence are to be exercised by the appellate Court. However, in the same Judgment, the Court has also observed that the Court at the same time have right, authority and power to refuse admission of additional evidence, if the action is not bona fide and intended to fill up the lacuna in the evidence. In my view, this is a case in the present situation involved in this appeal and I must hold that it is nothing but one more attempt to fill in lacuna which could have been properly dealt with during the pendency of the first appeal. The learned Counsel for the appellants also sought to put reliance on the Judgment in the case of ***The Municipal Corporation of Great Bombay v. Lala Pancham and others,*** AIR 1965 SC 1008 wherein it was observed by the Apex Court that the provision of Order 41, Rule 27 of the C.P. Code does not entitle the appellate Court to let in fresh evidence at the appellate stage when even without such evidence it can pronounce judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. Therefore, in view of these observations, it is needless to mention that the facts and circumstances involved in the present appeal do not warrant any latitude to the appellants to lead additional evidence as contemplated under Order 41, Rule 27 of C.P. Code. The learned Counsel for the appellants also made a request for remand of the matter for the same

purpose, so as to allow the appellants to lead further evidence which is sought to be introduced as an additional evidence at the stage of second appeal. In my considered view, taking into account the observations made by both the Courts below vis-a-vis the pleadings and other evidence on record, when the alleged exclusive ownership title of the plaintiffs is determined effectually, and the issues involved in that regard were effectually disposed of by the Courts below by concurrent findings, I do not see any merit in the plea of remand of the matter to the lower Court for adjudication afresh on the issue of possession.

7. The concurrent findings recorded by both the Courts below are seen to be given on the basis of available evidence on record, after appreciating the same in its proper perspective and, therefore, would brook no interference at this stage.

8. In the result, the appeal has no merit and, therefore, stands dismissed with no order as to costs. Consequently, the Misc. Civil Application No.98/2006 also stands dismissed with no order as to costs.

P.V. KAKADE, J.

ssm.